

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

)	
In the Matter of the Petition of)	
)	
The United Power Line Council)	
)	WC Docket No. 06-10
For a Declaratory Ruling Regarding the)	
Classification of Broadband Over Power)	
Line Internet Access Service As)	
An Information Service)	
_____)	

COMMENTS OF THE UNITED POWER LINE COUNCIL

United Telecom Council

Brett Kilbourne
Director of Regulatory Services and
Associate Counsel

1901 Pennsylvania Avenue, N.W.
Fifth Floor
Washington, D.C. 20006

(202) 872-0030

February 10, 2006

TABLE OF CONTENTS

I. INTRODUCTION	2
II. Like Cable Modem and DSL, BPL is an Information Service.	4
III. Classifying BPL Will Create a Level Playing Field for Competition and Promote Broadband Deployment Consistent with Broadband Policies.	9
IV. The Commission Can Classify BPL as an Information Service Based Upon the Existing Record Underlying the Cable Modem Declaratory Ruling, DSL Order and BPL Inquiry and Rulemaking.	13
V. CONCLUSION	21

SUMMARY

The United Power Line Council supports its Petition for Declaratory Ruling, which is consistent with the classification of cable modem and DSL services as information services. Classifying BPL as an information service will encourage the deployment of BPL and will provide a level playing field for BPL to compete with DSL and cable modem services. The UPLC believes that the Commission can make the requested declaratory ruling based on the existing record in several proceedings, including the BPL, DSL and Cable Modem proceedings. A declaratory ruling is appropriate and necessary, given that BPL is beginning to be offered on a wide-scale commercial basis.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

)	
In the Matter of the Petition of)	
)	
The United Power Line Council)	
)	WC Docket No. 06-10
For a Declaratory Ruling Regarding the)	
Classification of Broadband Over Power)	
Line Internet Access Service As)	
An Information Service)	
_____)	

COMMENTS OF THE UNITED POWER LINE COUNCIL

The United Power Line Council (“UPLC”) hereby submits its comments in support of its Petition for Declaratory Ruling that Broadband over Power Line (BPL)-enabled Internet access service (“BPL”) is an information service as defined in the Communications Act of 1934, as amended (the “Act”).¹ Classifying BPL as an information service would be consistent with the classification of cable modem and DSL services, and would provide a level playing field for BPL-enabled Internet access services. Moreover, classifying BPL as an information service would promote the Commission’s public policy goals of broadband access and competition by providing regulatory clarity,

¹ 47 U.S.C. § 153(20)(defining an information service as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.)

which will encourage investment and innovation in the development of BPL deployment and technology. In the same way that the Commission sought to eliminate regulatory barriers by classifying cable modem and DSL as information services, so to should it establish a minimal regulatory framework for BPL-enabled Internet access services.

I. INTRODUCTION

As the UPLC briefly explained in its Petition for Declaratory Ruling, the UPLC is an alliance of electric utilities and their technology partners to drive the development of BPL. The UPLC was formed in 2002 in recognition that a handful of electric utilities were testing the technology in the U.S. at that time. From this humble beginning, the UPLC has grown in both numbers and activity. Today, there are approximately 70 companies that are members of the UPLC, and practically every electric utility and technology company that is actively engaged in the deployment of BPL is a member of the UPLC.²

The UPLC was formed by the United Telecom Council, which has represented the telecommunications and information technology interests of all types of utilities and other critical infrastructure industries for over 50 years.³ Even before the formation of the UPLC, UTC advocated for policies to

² A list of the members of the UPLC is available at www.uplc.org.

³ The UTC is unique in that it represents the telecom and IT interests of electric, gas, and water utilities, as well as pipeline companies and other critical infrastructure industries. It

promote the development of BPL in several FCC proceedings.⁴ UTC is also the Access BPL database manager.⁵ The UPLC also has MOUs with various other international BPL organizations, including the PLCForum (Europe), the PLC Utilities Alliance (Europe), the PLC-J (Japan); as well as various industry consortia that are promoting standards for BPL, including the HomePlug Power Line Alliance and the Universal Powerline Association.

Given its broad-based membership and its ties with other utilities and BPL organizations around the world, the UPLC believes that it represents the general interests of the industry. It has advocated extensively on behalf of the industry in various proceedings at the FCC and with Congress, other regulatory bodies, standards organizations, and trade groups.⁶ In addition to its advocacy efforts, it supports the development of solutions for business, technical and utility applications issues for BPL.⁷ It also hosts industry

also represents the telecom and IT interests of each segment of the electric utility industry: investor-owned utilities (IOUs), municipal utilities (munis) and cooperatively organized utilities (co-ops).

⁴ See e.g. Comments of UTC, The Telecommunications Association in ET Docket No. 98-80 (filed Jul. 27, 1998); and Comments of the United Telecom Council in ET Docket No 01-278 (filed Feb. 12, 2002).

⁵OET Announces United Telecom Council to Serve as Database Manager for Access Broadband over Power Line Systems: Sets Deadline for Information Submission, Public Notice, ET Docket No. 04-37, 2005 WL 2573531.

⁶ See e.g. Comments, Reply Comments and Petition for Reconsideration of the United Power Line Council in ET Docket No. 04-37; Comments and Reply Comments of the United Power Line Council in ET Docket 03-104; Comments of the United Telecom Council and the United Power Line Council in ET Docket No. 04-36; and Comments of the United PowerLine Council in ET Docket 02-98.

⁷ The UPLC created committees to focus on each of these areas: business, technical, utility applications, as well as regulatory. These committees are co-chaired by representatives from a utility and a technology provider.

events, regular meetings, and is engaged with various standard-setting efforts on BPL.⁸

The regulatory classification of BPL service will have a direct effect on the interests of the members of the UPLC in the commercial deployment of BPL-enabled Internet access services. The UPLC filed the Petition for Declaratory Ruling to provide regulatory certainty, now that BPL is beginning to be deployed on a widespread commercial basis. Currently, there are several commercial deployments, the largest of which will reportedly serve two million homes in the Dallas, Texas area. In addition, there are over 40 trial deployments that are underway that may soon offer commercial services. As such, the UPLC is pleased to support the Petition for Declaratory Ruling in order to promote the commercial deployment of BPL, which will also promote the Commission's public policy interests in increasing broadband access and competition.

II. Like Cable Modem and DSL, BPL is an Information Service.

In setting out to classify cable modem and wireline broadband Internet services⁹ as information services, the Commission sought to “create a rational

⁸The UPLC hosts conferences three times a year, including its annual conference, a winter conference, and a BPL symposium at the UTC annual conference. It also holds quarterly audio conference educational presentations. In addition, it holds numerous teleconferences of its members to discuss specific matters of interest. The UPLC is engaged with the IEEE on its various BPL standards efforts, and coordinates with the various industry consortia that are also developing standards.

⁹ The UPLC recognizes that the term Wireline Broadband Internet access service includes many different access technologies (e.g. copper loop, hybrid copper-fiber loops, fiber-to-the-curb, fiber-to-the-premises), but for convenience, the UPLC hereinafter refers simply to

framework for the regulation of competing services that are provided via different technologies and network architectures.”¹⁰ As such, the Commission focused on the functions provided by cable modem and DSL, rather than the underlying technologies. Not only did the Commission recognize that this approach would naturally lead to its goal of developing a rational framework for regulating competing broadband services, it also recognized that this approach was consistent with the terms of the statute as well.¹¹

The Commission found that both cable modem and DSL fundamentally provide Internet access capabilities, and that such Internet access service “always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups.”¹² In this regard, it concluded that both cable modem and DSL were each a “functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the

“DSL” as part of the larger class of wireline broadband Internet access services that the Commission classified in its *DSL Order*).

¹⁰ *Notice of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, 17 FCC Rcd. 4798 at ¶6 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d National Cable Telecomms. Assn. v. Brand X Internet Svcs.*, 125 S. Ct. 2688 (2005).

¹¹ *Cable Modem Declaratory Ruling* at ¶35 (noting that “[n]one of the foregoing statutory definitions [of information services, telecommunications services and telecommunications] rests on the particular types of facilities used. Rather, each rests on the function that is made available.”)

¹² *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, 2005 WL 2347773 at ¶9 (“*DSL Order*”).

consumer always uses them as a unitary service.”¹³ This functional integration of transmission and information processing capabilities directly led the Commission to conclude that both cable modem and DSL services were information services.¹⁴

The Commission should adopt the same approach towards BPL and conclude that it is also an information service. BPL provides end-users the kind of Internet access service functionality that led the Commission to classify cable modem and DSL as information services. BPL enables end-users to email, surf the web and otherwise interact and store information from various newsgroups, as then Commissioner Martin attested in his separate statement to the *BPL Notice of Inquiry*.¹⁵ In addition, BPL offers

¹³ *Id.* (comparing DSL to cable modem as both functionally integrated finished services). *See also Cable Modem Declaratory Ruling* at ¶38 (finding that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.)

¹⁴ *Id.* (explaining that DSL’s capability to retrieve and store files from the web is one of “a variety of applications that fit under the characteristics stated in the information service definition”. *See also Cable Modem Declaratory Ruling* at ¶38 (stating that “cable modem service supports such functions as e-mail, newsgroups, maintenance of the user’s World Wide Web presence, and the DNS” and concluding that “cable modem service, an Internet access service, is an information service.”)

¹⁵ “Having seen first hand a BPL system in operation, I am confident that this technology can achieve great things. Last week I visited a home in Maryland, where Current Technologies has established a demonstration site in cooperation with Potomac Electric Power Company. I came away truly impressed. Using BPL technology, *I was able to watch a DVD quality movie, play a highly graphical interactive video game on the Internet, and print pages from a news web site on a printer in another room - all simultaneously*. I was impressed not only with the speed, but also with the ease with which the home could be networked. Simply plugging a device into an electrical outlet enabled it to communicate with the other devices plugged into outlets in other rooms, as well as connect with the Internet. While I recognize that full scale commercial applications may not immediately achieve the speeds that I witnessed, it is clear this technology has significant potential.” *Inquiry Regarding Carrier Current Systems, including Broadband Over Power Line Systems*, Notice of Inquiry, ET

enhanced capabilities for end-users to network devices and for those devices to interact with each other for “smart home” and “smart grid” applications. Moreover, the ubiquity of the electric distribution network enables BPL to take broadband to places where DSL and cable modem cannot reach.¹⁶ Because there is broadband wherever there is power, BPL enables interactive communication with, for example, video cameras on telephone poles for traffic monitoring and control, and advanced meter reading that enables utilities to better manage the delivery of electric service to their customers. Most importantly, BPL provides end-users with Internet access service that is a finished service, which combines transmission and information processing capabilities inextricably. As such, the UPLC submits that BPL is an information service, consistent with the Commission’s underlying rationale for classifying DSL and cable modem services as information services.

Also consistent with its *Cable Modem Declaratory Ruling* and its *DSL Order*, the Commission should clarify that BPL is an information service whether or not the provider uses its own facilities,¹⁷ if it offers VoIP,¹⁸ or if

Docket No. 03-104, 18 FCC Rcd. 8498, 8517 (2003), (Separate Statement of Commissioner Kevin J. Martin), *emphasis added*. (“*BPL Notice of Inquiry*”).

¹⁶ Comments of Current Technologies, Inc. in ET Docket No. 03-104 at 6 (filed Jul. 7, 2003) (“BPL can take broadband service to places where DSL and broadband cable cannot reach.”)

¹⁷ *DSL Order* at ¶¶16 and 105. *See also Cable Modem Declaratory Ruling* at ¶41.

¹⁸ *Cable Modem Declaratory Ruling* at ¶¶44-46.

the service is offered as a wholesale input for ISPs.¹⁹ This clarification would provide the BPL industry with the flexibility that the Commission provided to the cable modem and DSL industries, allowing them to offer certain services or structure business relationships without the fear that they would inadvertently lead to regulation. Moreover, BPL is distinct from cable modem and DSL because it would not use infrastructure that was ever subject to common carrier or other FCC regulations. Therefore, the underlying rationale for broadly classifying cable modem and DSL as information services would apply with equal or greater force in the context of encouraging the development of the nascent BPL industry. As such, the UPLC respectfully requests that the Commission make this clarification in the course of classifying BPL as an information service.

In addition, the Commission should also clarify that BPL is an interstate information service, consistent with its findings in the *Cable Modem Declaratory Ruling*. In declaring that cable modem is an interstate information service, the Commission explained that “traffic bound for information service providers (including Internet access traffic) often has an interstate component.”²⁰ Just as it generally treats Internet traffic as interstate, the Commission concluded that cable modem traffic should be treated as interstate as

¹⁹ *DSL Order* at ¶103. *See also Cable Modem Declaratory Ruling* at ¶¶42-43.

²⁰ *Cable Modem Declaratory Ruling* at ¶59, citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, [16 FCC Rcd 9151 \(2001\)](#).

well. Accordingly, it classified cable modem service as an interstate information service.²¹ The same rationale should apply to classify BPL as an interstate information service, and the UPLC respectfully requests that the Commission also make this clarification in the course of classifying BPL as an information service.

III. Classifying BPL Will Create a Level Playing Field for Competition and Promote Broadband Deployment Consistent with Broadband Policies.

As enunciated in the *Cable Modem Declaratory Ruling* and reiterated in the *DSL Order*, one of the Commission's three overarching broadband policy principles is to treat like services in a similar manner.²² The Commission recognized that residential high-speed access to the Internet is evolving over multiple electronic platforms, and it explained that developing an "analytical approach that is, to the extent possible, consistent across multiple platforms" would "promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met."²³

Classifying BPL as an information service would promote competition by providing a level regulatory playing field with cable modem and DSL services. The Commission has recognized that "[b]ecause power lines reach virtually every home and community in the country, [BPL] ... could play an

²¹ *Id.*

²² *Cable Modem Declaratory Ruling* at ¶6. *And see DSL Order* at ¶45.

²³ *Cable Modem Declaratory Ruling* at ¶6.

important role in providing additional competition in the offering of broadband services to the American home and consumers.”²⁴ Specifically, it has acknowledged that BPL “may offer a competitive alternative to digital subscriber line (DSL), cable modem services and other high-speed Internet technologies.”²⁵ The NTIA agrees that BPL “holds great promise as a new source of innovation and competition in the broadband marketplace.”²⁶ In order to fulfill the promise of BPL as a third major facilities-based broadband competitor, the Commission should provide regulatory parity by classifying it as an information service.

Classifying BPL as an information service would also promote broadband access by encouraging investment and the deployment of BPL services. Section 706 of the Telecommunications Act of 1996 mandates that the Commission “*shall* ... encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by “regulatory forbearance, measures that promote competition . . . , or other regulating methods that remove barriers to infrastructure investment.”²⁷ In addition, section 230(b)(2)

²⁴ *Carrier Current Systems, including Broadband over Power Line Systems and Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, Notice of Proposed Rulemaking, ET Docket Nos. 03-104 and 04-37, 19 FCC Rcd 3335 at ¶ 1 (2004) (“*BPL NPRM*”).

²⁵ *Id.* at ¶ 3.

²⁶ Comments of the National Telecommunications and Information Administration in ET Docket No. 04-37 at 2 (filed June 4, 2004).

²⁷ See Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (“Section 706”). Section 706 defines “advanced telecommunications capability” “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to

of the Act establishes a general policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²⁸ Accordingly, the first two guiding principles behind the Commission’s broadband policy seek to promote broadband access through a minimal regulatory environment that encourages investment.²⁹ Therefore, classifying BPL as an information service would help to encourage investment in, and promote the deployment of, BPL.

Classifying BPL as an information service would be consistent with public policies that promote the development of new technologies, and it would help achieve the President’s goal of universal affordable broadband by 2007. Section 7 of the Communications Act of 1934 establishes that it is the policy of the United States to encourage the provision of new technologies and services to the public, and it sets a one-year limit for the FCC to determine whether a new technology or service presented in a petition or application is in the public interest.³⁰ In general, the Commission has tended to refrain

originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” *Id.* BPL qualifies as an advanced telecommunications service, because it provides speeds in excess of 200 kbps in both directions. *See e.g.* Comments of Southern LINC, Southern Telecom, Inc. and Southern Company Services, Inc. in ET Docket No. 03-104 at 13 (filed Jul. 7, 2003)(stating that “data transmission rates for Access BPL can range from 250-500 kbps on the low end to speeds that are about twice as fast as the current generation of cable modems.”)

²⁸ *See* Communications Act § 230(b)(2), 47 U.S.C. § 230(b)(2).

²⁹ *Cable Modem Declaratory Ruling* at ¶¶4-5.

³⁰ 47 U.S.C. § 157 (2000).

from regulating nascent services, such as BPL;³¹ and President Bush has specifically advocated for policies that will promote the deployment of BPL, as part of achieving the administration's overall goal of providing universal affordable broadband by 2007.³² As such, classifying BPL as an information service will promote innovation, which was one of the factors that led the Commission to classify DSL as an information service.³³

As the UPLC explained in its Petition, BPL can also promote the public interest by improving the efficiency, safety and reliability of essential electric services to the public at large, and by supporting public safety and homeland security applications. This further underlines the basis for

³¹ *See e.g.* "The Nascent Services Doctrine" Remarks of FCC Commissioner Kathleen Q. Abernathy Before the Federal Communications Bar Association, New York Chapter, July 11, 2002 at <http://www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html> (recommending regulatory restraint towards new technologies and new platforms). *See also* "Reaching Broadband Nirvana" United PowerLine Council Annual Conference, Remarks of Commissioner Kathleen Q. Abernathy, Sept. 22, 2003 at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239079A1.doc (advocating the Nascent Services Doctrine in the context of BPL).

³² *See* "President Unveils Tech Initiatives for Energy, Health Care, Internet," transcript of remarks by the President at American Association of Community Colleges Annual Convention, Minneapolis, Minnesota (Apr. 26, 2004), at <http://www.whitehouse.gov/news/releases/2004/04/20040426-6.html> (stating that, "There needs to be technical standards to make possible new broadband technologies, such as the use of high-speed communication directly over power lines. Power lines were for electricity; power lines can be used for broadband technology. So the technical standards need to be changed to encourage that.") *See also* "Bush Calls for Universal Broadband by 2007," MSNBC (Mar. 26, 2004) at <http://www.msnbc.com/id/4609864>. (announcing that "[the U.S.] ought to have universal, affordable access for broadband technology by the year 2007, and then we out to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to purchasing the broadband carrier."); *And see* Presidential Memorandum to the Heads of Executive Department and Agencies (Apr. 26, 2004) at <http://www.whitehouse.gov/news/releases/2004/04/20040426-2.html>. (reiterating that all Americans should have affordable access to broadband technology by the year 2007).

³³ *DSL Order* at ¶¶65-70 (finding that imposing an access requirement on DSL services for ISPs would impede innovation).

classifying BPL as an information service. By classifying BPL as an information service and hence encouraging its deployment as explained above, the Commission will also promote the development of BPL for these energy, public safety and homeland security applications that advance other important public policy objectives in addition to broadband access and competition. Therefore, the case for classifying BPL as an information service is bolstered by these additional public policy considerations.

IV. The Commission Can Classify BPL as an Information Service Based Upon the Existing Record Underlying the Cable Modem Declaratory Ruling, DSL Order and BPL Inquiry and Rulemaking.

As the UPLC stated in its petition for declaratory ruling, the Commission can and should declare that BPL is an information service based on the record from the Cable Modem, DSL and BPL proceedings, as well as several other proceedings. First, the Commission should act expeditiously to remove regulatory uncertainty, which the FCC may do through a declaratory ruling. Second, the timing of the declaration is important because BPL is beginning to be deployed commercially on a wider scale, and regulatory clarity will encourage additional deployments. Third, the Commission has developed an extensive record from which it may refer to declare BPL as an information service. In the following comments, the UPLC wishes to provide additional detail about the relevant proceedings that can serve as the basis for the FCC to issue the requested declaratory ruling.

In the *Cable Modem Declaratory Ruling*, the Commission began by citing to the *Universal Service Report*, which found that Internet access service is an information service.³⁴ Given that Internet access service is an information service, it followed that cable modem provided an information service because it enabled “E-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS, [which are] applications commonly associated with Internet access are applications that are commonly associated with Internet access service”³⁵ The Commission then quickly classified cable modem as an information service, because it combines Internet access service with data transmission services as an integrated service that cannot be separated into components.³⁶

In *Brand X*, this rationale was upheld by the Supreme Court, which agreed that “the cable wire is used to access the World Wide Web, newsgroups, etc., rather than ‘transparently’ to transmit and receive ordinary-language messages without computer processing or storage of the message.”³⁷ The Supreme Court concluded that “the integrated character of

³⁴ *Cable Modem Declaratory Ruling*, at ¶36, citing *Universal Service Report*, 13 FCC Rcd at 11536 ¶ 73. (1998).

³⁵ *Id.* at ¶38.

³⁶ *Id.* at ¶¶38 and 41. (“We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications. As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user’s World Wide Web presence, and the DNS. Accordingly, we find that cable modem service, an Internet access service, is an information service.”)

³⁷ *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688, 2702-2710 (2005) (*NCTA v. Brand X*), *aff’g Inquiry Concerning High-Speed Access to the*

this offering led the Commission to conclude that cable companies do not make a stand-alone, transparent offering of telecommunications.”³⁸ The Court elaborated that cable modem service providers offer a finished Internet service, though they do so using the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct offerings.³⁹

In the *DSL Order*, the Commission extended the rationale from the *Cable Modem Declaratory Ruling* and the *Brand X* decision to apply to telecommunications networks used to provide DSL and other broadband services.⁴⁰ In doing so, the Commission quickly distinguished the broadband applications classified as information services from the narrowband applications on the telecommunications networks that provide basic

Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

³⁸ *Id.*

³⁹ *NCTA v. Brand X*, 125 S. Ct. at 2704-2706.

⁴⁰ *DSL Order* at ¶2 (distinguishing facilities based wireline Internet access providers that are subject to legacy regulation from cable modem service providers that had not been previously classified under the Act of subjected to any network access requirements). *And see DSL Order* at ¶14. (concluding that “wireline broadband Internet access service provided over a provider’s own facilities is appropriately classified as an information service because its providers offer a single, integrated service (*i.e.*, Internet access) to end users. That is, like cable modem service (which is usually provided over the provider’s own facilities), wireline broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (*e.g.*, e-mail, web pages, and newsgroups). These applications encompass the capability for ‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,’ and taken together constitute an information service as defined by the Act.”)

transmission services, which remained classified as telecommunications services. “These [narrowband telecommunications] services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities.”⁴¹ By contrast,

“the capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, ‘between or among points selected by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.’ Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as “information services.”⁴²

The record from the BPL Inquiry and the BPL NPRM proceedings supports the classification of BPL as an information service. The record shows that BPL provides Internet access service as a finished service that inextricably combines data transmission and information service applications, similar to cable modem and DSL. As Southern explained in its comments in the BPL Inquiry proceeding,

Access BPL utilizes the existing electric power grid as the foundation for the delivery of broadband communications services directly to homes and businesses without significant construction activity. Like other facilities-based broadband services, such as DSL or cable modem, the service is provided to the customer by utilizing the additional signal-carrying capacity of existing facilities.⁴³

⁴¹ *Id.* at ¶9.

⁴² *Id.* at ¶40 (citations omitted).

Not only does BPL support consumer applications such as email and web surfing, it also supports utility and homeland security applications; and these various types of applications offer the capability for “generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.”⁴⁴

The record from the BPL Inquiry and the BPL NPRM also shows that BPL will promote the public interest in broadband access. In the BPL NPRM, many commenters acknowledged that Access BPL could provide significant public interest benefits in expanding access to broadband services, particularly in unserved and underserved areas.⁴⁵ For example, rural utilities like the Northwest Iowa Power Cooperative supported the continued growth and development of BPL as key to providing its rural areas with state of the art broadband services that are desperately needed for economic survival.⁴⁶ Similarly, Chugach Electric Association, Inc. stated that BPL may

⁴³ Comments of Southern LINC, Southern Telecom, Inc. and Southern Company, Inc. (Southern) in ET Docket No. 03-104 at 7 (filed Jul. 7, 2003). Southern continued to further describe BPL services. *Id.* at 7-9.

⁴⁴ *See* 47 U.S.C. §153(20) (defining information service).

⁴⁵ Comments of Matsushita in ET Docket No. 04-37 at 3 (filed May 3, 2004)(stating that BPL promises to provide many homes with wired broadband service, and may be able to serve homes in geographic areas that are unserved by other broadband technologies.)

⁴⁶ Reply Comments of Northwest Iowa Power Cooperative in ET Docket No. 03-104 at 1 (filed Aug. 20, 2003).

enable it to provide its customers with an alternative or, in some cases, the only source for broadband Internet access and associated applications, such as voice, video on demand, home security and smart-home appliances.⁴⁷

As for promoting competition, AT&T commented that “BPL promises to help end [the cable-DSL] duopoly and bring the benefits of robust broadband competition to millions of customers.”⁴⁸ Earthlink agreed that Access BPL may provide a competitive alternative to the present cable and DSL duopoly, which would mean increased choices and reduced prices for consumers.”⁴⁹ Similarly competitive voice service providers favored pro-BPL policies. LecStar supported BPL as a cost-effective access alternative to the “high-cost, poor service and contentious legal and regulatory environment associated with using an ILEC as a monopoly access vendor.”⁵⁰ Net2Phone similarly stated that the “technology can be used to bolster the development of VOIP and competition in the provision of voice services.”⁵¹

As for its utility and homeland security applications, utilities agreed with the Commission’s observation in the *BPL NPRM* that Access BPL could “allow electric utilities to improve the safety and efficiency of the electric

⁴⁷ Comments of Chugach Electric Association, Inc. in ET Docket No. 03-104 at 4-5 (filed Aug. 18, 2003).

⁴⁸ Comments of AT&T in ET Docket No. 04-37 at 3 (filed May 3, 2004).

⁴⁹ Reply Comments of Earthlink in ET Docket No. 04-37 at 1 (filed June 22, 2004).

⁵⁰ Comments of LecStar in ET Docket No. 04-37 at 3 (filed May 3, 2004).

⁵¹ Reply Comments of Net2Phone in ET Docket No. 03-104 at 5 (filed Aug. 20, 2003).

power distribution systems and also further our national homeland security by protecting this vital element of the U.S. critical infrastructure.”⁵² Specifically, Access BPL systems enable a variety of Enhanced Power Distribution Service (“EPDS”) operations, which could include outage detection and confirmation, remote monitoring and operation of switches and transformers, more efficient demand-side management programs, and power quality monitoring to detect faulty components before they fail.⁵³ Even the NTIA echoed the utility benefits from BPL, which “should yield additional motivation and resources for maintaining the electric power distribution system, predicting and preventing faults, and achieving more rapid repairs in an affordable manner” as well as including “substantial reliability improvements” in the Nation’s electric infrastructure.⁵⁴

Finally, the record from the BPL Inquiry and the BPL NPRM supports classifying BPL as an information service in order to encourage investment and further development of BPL. For example, even though Chugach was optimistic about BPL, it recognized that challenges to BPL remain, and stated that “[w]hether Chugach deploys BPL as part of critical electric utility infrastructure or commercial services will be determined in large part by the

⁵² See *BPL NPRM* at ¶30. And See Comments of Southern LINC, Southern Telecom and Southern Company, Inc. (“Southern”) in ET Docket No. 04-37 at 4-6; and Reply Comments of Southern at 2. See also Reply Comments of PPL Telcom, Inc. at 7 (filed June 22, 2004).

⁵³ Comments of Hawaiian Electric Company in ET Docket No. 04-37 at 2 (filed May 3, 2004), and Comments of Cinergy in ET Docket No. 04-37 at 2 (filed May 3, 2004).

⁵⁴ Comments of NTIA in ET Docket No. 04-37 at v, 4 (filed June 4, 2004).

BPL technical rules that the FCC adopts and by the Regulatory Commission of Alaska.”⁵⁵ Similarly, Duke explained that,

“[i]n order for BPL’s potential to be realized, it must make business sense for equipment vendors and electric utilities to invest the time, money, and resources necessary to launch Access BPL as a viable broadband competitor and internal utility resource. Access BPL is a prime example of what has been described as a ‘nascent platform’ and its viability is extremely sensitive to the regulatory signals the FCC sends. Companies take significant risks when investing in communications networks, particularly those that employ emerging technologies. Overly prescriptive regulations ... would severely damage the business case for BPL and could condemn the technology before it can even get started.”⁵⁶

PPL Telcom, LLC and other utilities echoed these concerns.⁵⁷ As such, the record in the BPL Inquiry and the BPL NPRM underline the need for the Commission to act now and issue a declaratory ruling that BPL is an information service, which will provide regulatory certainty that will encourage investment and deployment of BPL, and provide a level playing field for BPL to compete with cable modem and DSL.⁵⁸

⁵⁵ Comments of Chugach Electric Association, Inc. in ET Docket No. 03-104 at 4-5 (filed Aug. 18, 2003).

⁵⁶ Comments of Duke Power in ET Docket No. 04-37 at 4 (filed May 3, 2004).

⁵⁷ Reply Comments of PPL Telcom, LLC in ET Docket No. 04-37 at 7-8 (filed June 22, 2004). *See also* Comments of Consolidated Edison Company of New York at 3 (filed May 3, 2004)(citing large investment of resources and effort at stake in BPL and advising against overly restrictive regulations).

⁵⁸ As noted in the UPLC Petition for Declaratory Ruling, the Commission may also draw from several other proceedings, including the *Fourth Section 706 Report* and the *High-Speed Services July 2005 Report* to classify BPL as an information service. *See Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at 18-23, 45 (rel. Sept. 9, 2004) (*Fourth Section 706 Report*)(describing wireless, satellite, and power line platforms) *And see* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and

V. CONCLUSION

The Commission should issue a declaratory ruling that classifies BPL as an information service, consistent with its classification of cable modem and DSL services as information services. BPL is like cable modem and DSL in that it provides Internet access service as a functionally integrated finished service. Moreover, classifying BPL as an information service will encourage the deployment of broadband services to all Americans, consistent with Section 706 of the Telecommunications Act. It will also provide a level playing field for BPL to compete with cable modem and DSL services, consistent with the Commission's goal to provide a rational regulatory framework for broadband services that is technology neutral. Finally, it will encourage innovation by providing a minimal regulatory framework for this new technology, which promises to promote electric utility service and homeland security, as well as broadband service to the public at large. The Commission can and should make the declaratory ruling based on the existing record before it. As BPL is beginning to be commercially deployed, and as it may promote broadband access and competition to many parts of the country that are unserved or underserved, now is the time for the Commission to make this declaratory ruling.

Technology Division, *High-Speed Services for Internet Access as of December 31, 2004*, at Table 3, Chart 6 (rel. July 7, 2005) (*High-Speed Services July 2005 Report*). In addition the Commission may also refer to comments by Comcast in Docket MB 05-255 *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, which outlines Comcast's belief that BPL, although nascent, has the potential to provide additional video distribution competition.

WHEREFORE, THE PREMISES CONSIDERED, the UPLC respectfully requests that the FCC declare that BPL-enabled Internet access service is an interstate information service, consistent with the *Cable Modem Declaratory Ruling* and the *DSL Order*.

Respectfully submitted,

UPLC

By: _____
Brett Kilbourne
Director of Regulatory Services and
Associate Counsel

1901 Pennsylvania Avenue, N.W.
Fifth Floor
Washington, D.C. 20006
(202) 872-0030

February 10, 2006

SERVICE LIST

Chairman Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Deborah Taylor Tate
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554